

SURROGATE PARENTHOOD: FINDING A NORTH CAROLINA SOLUTION

KATHARINE T. BARTLETT*

The issue of surrogate parenthood crystallizes a set of tensions between a number of important values relating to family, gender roles and parenthood. Our belief that motherhood is sacred and that mothers and their children should be together makes us sympathetic with a surrogate mother who wants to keep her child; but our respect for the reproductive drive of humans, generally, makes us understanding as well of the biological father who insists he should have custody of his child. Our concern for the potential exploitation of women as baby machines fights with our belief that people (including women) who make deals should stick to them. The value we place on biological parenthood conflicts with our empathy for couples who are unable to have their own genetic children and our desire to promote adoption of children without parents. Because these values are *all* important to us, we want to resolve the conflict between them correctly. At the same time, because we believe in all these (conflicting) values, we can't help but be ambivalent or torn; the correct moral and legal answers seem all too elusive and intractable.

The purpose of this article is to review the major choices that the North Carolina legislature faces with respect to surrogate parent arrangements,¹ and to place those choices in the context of the North Carolina statutes that already exist to handle disputes over child custody and adoption. In reviewing those choices, I argue that statutes already in place, many of which are typical of those that exist in other states, provide a satisfactory set of principles for resolving the impasse over surrogate parenthood. These statutes, while not enacted with surrogacy arrangements clearly in mind, take account of many of the same value conflicts that are implicated by surrogacy arrangements. They form a framework which, when applied to surrogacy, would allow only those arrangements in which fees are not paid (over and above actual maternity expenses) and, even then, would not enforce the custody provisions of surrogacy contracts if the mother over the course of her pregnancy

* Professor of Law, Duke University School of Law. I am grateful to Janelle Sherlock for research assistance in preparing this article.

1. The 1987-88 session of the General Assembly established the Adoptions/Surrogate Parenthood Study Commission to study the legal issues raised by surrogate parent arrangements. The Final Report of this Commission is not expected until 1991.

and childbirth changes her mind and wishes to retain custody of the child. The article also identifies areas in North Carolina law that are ambiguous as applied to surrogacy arrangements and which the legislature may wish to clarify, even if it decides to retain its existing basic structure in adoption and custody law for handling conflicts arising out of surrogacy arrangements.

I. LEGAL APPROACHES TO SURROGACY

There are three basic approaches a state might take in regulating surrogate parenting contracts. The most hostile approach would be to criminalize participation by some or all of the parties to surrogate parent arrangements; this is the *criminalization* approach. Virtually every state has laws which prohibit the payment of money in connection with adoption.² Two courts have declared in dicta that these laws are applicable to surrogate parent contracts.³ States choosing to apply these statutes would be criminalizing participation in surrogacy arrangements only to the extent that they involve the exchange of money. A few state legislatures, including Florida and Michigan, have specifically adopted legislation that prohibits both the payment of money and the arrangement thereof by third parties in connection with a surrogate parent contract.⁴ A state might also choose to criminalize participation in surrogacy arrangements whether or not these arrangements involved the payment of money.

A second approach that a state might take is to permit parties to enter into surrogate parent arrangements, but refuse to enforce these arrangements in a custody proceeding if one party seeks to renege. This is the *unenforceability* approach. Under this approach, neither biological parent would necessarily have the right to custody of the child, but the custody question would be resolved under child custody, not contract, law.

2. Pierce, *Survey of State Activity Regarding Surrogate Motherhood*, 11 FAM. L. REP. (BNA) 3001 (Jan. 29, 1985). States also typically prohibit the activities of middlemen or "baby brokers." See Katz, *Surrogate Motherhood and the Baby-Selling Laws*, 20 COL. J. LAW & SOC. PROBS. 1, 8 n.34 (1986) (listing 24 specific statutes prohibiting baby-brokering activities). Many states make exceptions to their anti-baby-selling statutes for maternity expenses and other actual costs. See Wolf, *Enforcing Surrogate Motherhood Agreements: The Trouble With Specific Performance*, IV N.Y. LAW SCH. HUM. RTS. ANN. 375, 389 (1987). Except for the expenses of preparing and filing the adoption petition, N. C. GEN. STAT. § 48-37 (Supp. 1988), North Carolina does not. See 45 N.C. ATTY. GEN. REP. 24, (1975) (payment for pregnant woman's transportation, room, board and medical care, would violate anti-baby-selling statute).

3. *In re Baby M.*, 109 N.J. 396, 423-25, 537 A. 2d 1227, 1240-42 (1988); *Yates v. Keane*, 14 FAM. L. REP. (BNA) 1160 (Mich. Cir. Ct. 1987).

4. See Act effective July 1, 1988, ch. 88-143, 1988 Fla. Laws 477 (West); MICH. COMP. LAWS §§ 722-581-722.863 (1988). Some foreign jurisdictions have done so as well. See, e.g., Surrogacy Arrangements Act, 1985, ch. 49 (criminalizing activities of agencies and brokers in the United Kingdom).

The New Jersey Supreme Court in the *Baby M.* case adopted this approach, and a few states have followed by enacting specific statutes declaring that surrogacy contracts are void and unenforceable.⁵

Finally, a state might permit surrogacy contracts and enforce them in its courts, subject to whatever regulations the state deems necessary to eliminate potential abuses. This is the *enforceability* approach. Under this approach, regulations might be enacted relating to such matters as the amount of fees that may be paid, counselling requirements, qualifications of the participants, and the like.⁶ These regulations might detail some types of provisions that would not be specifically enforceable, such as the mother's agreement to undergo amniocentesis or have an abortion, or a provision that if the father does not obtain custody of the child he will not be obligated for his or her support. Unlike the prohibition against payment of fees, however, these provisions would be intended to control, not eliminate, the practice of surrogacy. Interestingly, while many legislative proposals made in various states involve extensive regulatory schemes,⁷ the few recently-enacted statutes allowing surrogacy agreements contain no such specific limitations.⁸

II. EXISTING NORTH CAROLINA LAW.

A. Adoption Statutes

At the heart of any surrogacy arrangement is the expectation that a child who is conceived and carried to term by one woman be adopted by another. North Carolina, like all other states, has a comprehensive statutory scheme regulating adoption. This scheme covers a wide range of matters including who may adopt, who must consent, who must investigate an adoptive home, what reports must be made and what records

5. See IND. CODE ANN. § 31-8-2-2 (Burns Supp. 1988); LA. REV. STAT. ANN. 9:2713 (West Supp. 1989).

6. Some of the possible areas of regulation are detailed in Note, *Developing a Concept of the Modern "Family": A Proposed Uniform Surrogate Parenthood Act*, 73 GEO. L.J. 1283, 1299-1321 (1985) (hereafter *Developing a Concept*); Note, *Surrogate Motherhood: Contractual Issues and Remedies under Legislative Proposals*, 23 WASHBURN L. J. 601, 617-26 (1984); Comment, *Artificial Insemination and Surrogate Motherhood—A Nursery Full of Unresolved Questions*, 17 WILLAMETTE L. J. 913 (1981); Note, *Surrogate Motherhood Legislation: A Sensible Starting Point*, 20 IND. L. REV. 879 (1987); Comment, *Womb for Rent: A Call for Pennsylvania Legislation*, 90 DICK L. REV. 227, 251-59 (1985); Coleman, *Surrogate Motherhood: Analysis of the Problems and Suggestions for Solutions*, 50 TENN. L. REV. 71, 118-19 (1982); Note, *Legal Recognition of Surrogate Gestation*, 7 WOMEN'S RTS. L. REP. 107, 135-42 (1982) (authored by Cynthia A. Rushevsky).

7. See *Surrogate Parenthood: A Legislative Update*, 13 FAM. L. REP. (BNA) 1442 (July 14, 1987) (describing 64 bills relating to surrogacy, about 14 of which would allow and regulate surrogacy contracts).

8. See ARK. STAT. ANN. § 9-10-201(c)(1)(1987) (in case of surrogacy, mother of child shall be "woman intended to be mother"); NEV. REV. STAT. ANN. § 127.287(5) (1988) (anti-baby-selling statute not applicable if woman enters into "lawful contract to act as surrogate").

kept, and the like.⁹ Two provisions of the North Carolina General Statutes relating to adoption law are particularly relevant to surrogacy contracts. Section 48-11(a) gives a parent ninety days to revoke her or his consent to an adoption (thirty days if placement is with a director of social services or a "duly-licensed child-placing agency"). And Section 48-37 makes it a misdemeanor "to offer or give, charge or accept any fee, compensation, consideration or thing of value for receiving or placing, arranging the placement of, any child for adoption." Virtually every state has similar provisions.¹⁰

Supporters of surrogate parent arrangements argue that adoption statutes should not apply to surrogacy arrangements. This argument, which has had some success in the courts,¹¹ follows a number of different rationales. First, it is argued that a woman who is considering becoming a surrogate mother is not under the same kind of stress and pressure as a woman already (and accidentally) pregnant, and thus is not in need of the same kind of protection.¹² Another argument, applicable especially to the criminal baby-selling prohibitions, is that a surrogate parent contract is not for the *sale* of a baby, but rather for the performance of the surrogate mother's *services*.¹³

These arguments for disregarding existing adoption statutes are unpersuasive. One of the important purposes of adoption laws is to protect the biological mother, whose private circumstances are often desperate from being exploited. The General Assembly states that two of the primary

9. N. C. GEN. STAT. ch. 48 (1984 & Supp. 1988).

10. See *Pierce*, *supra* note 2.

11. See *Surrogate Parenting Assocs. v. Kentucky*, 704 S.W. 2d 209 (Ky. 1986) (distinguishing surrogate parenting arrangements from buying and selling of babies); *In re Baby M.*, 217 N.J. Super. 313, 525 A. 2d 1128 (Ch. Div. 1987), *aff'd in part & rev'd in part*, 109 N.J. 396, 537 A. 2d 1227 (1988) (adoption statutes not applicable to surrogacy arrangements); *In re Adoption of Baby Girl L.J.*, 132 Misc. 2d 972, 505 N.Y.S. 2d 813 (1986) (\$10,000 fee in surrogacy arrangement does not violate New York anti-baby-selling statute).

12. See Note, *Developing a Concept*, *supra* note 6, at 1288; Comment, *Revocation of Parental Consent to Adoption: Legal Doctrine and Social Policy*, 28 U. CHI. L. REV. 564, 570, 571 (1961); Comment, *Surrogate Mother Agreements: Contemporary Legal Aspects of a Biblical Notion*, 16 U. RICH. L. REV. 467, 479 (1982) (hereafter *Surrogate Mother Agreements*); Note, *Legal Recognition of Surrogate Gestation*, *supra* note 6. Comment, *Surrogate Mother Agreements*, *supra* note 12, at 478-79; Note, *Moppets on the Market: The Problem of Unregulated Adoptions*, 59 Yale L. J. 715, 724-29 (1950). This argument was endorsed by the Kentucky Supreme Court in *Surrogate Parenting Assocs. v. Commonwealth ex rel. Armstrong*, 704 S. W. 2d 209, 211, 212 (Ky. 1986), and by the trial court in *In re Baby M.*, 217 N. J. Super. 313, 372, 525 A. 2d 1128, 1157 (1987). In the *Baby M.* case, the New Jersey Supreme Court rejected the argument on appeal, 109 N.J. 396, 437-38, 537 A. 2d 1227, 1248 (1988).

13. See, e.g., Coleman, *supra* note 6, at 81, 108-17; Katz, *Surrogate Motherhood and the Baby-Selling Laws*, 20 COLUM. J. L. & SOC. PROBS. 1, 21, 25 (1986); Keane, *Legal Problems of Surrogate Motherhood*, 1980 S. ILL. U.L.J. 147, 154-59; Note, *Developing A Concept*, *supra* note 6, at 1289-92; Note, *Litigation, Legislation, and Limelight: Obstacles to Commercial Surrogate Mother Arrangements*, 72 IOWA L. REV. 415, 422-27 (1987); Comment, *Surrogate Mother Agreements*, *supra* note 12 at 479.

purposes of Chapter 48 are "to protect children from unnecessary separation from parents who might give them good homes and loving care" and "to protect them from adoption by persons unfit to have the responsibility of their care and rearing."¹⁴ One of its secondary purposes is "to protect the biological parents from hurried decisions, made under strain and anxiety, to give up a child."¹⁵ While it may be true that a pregnant woman experiences a kind of pressure not experienced by her non-pregnant counterpart, it cannot be said that a woman considering surrogacy arrangements will not be subject to extraordinarily severe exploitation. If surrogate parenting arrangements were to become an acceptable way of earning money, women—especially poor women with limited options for economic well-being—may feel considerable pressure, either self-imposed or imposed by others, to bear a child for someone else.¹⁶ In other words, one does not need to be already pregnant to be exploited for one's procreative potential.

Moreover, as we learned from the *Baby M.* case, it is questionable whether any woman can make a well-considered decision about surrendering her child for adoption before the child is born. Indeed, the already-pregnant woman may be able to anticipate the extent of her personal costs in relinquishing a child she has borne better than a woman not yet pregnant with that child. In any event, the law should not disaffirm the positive emotional feelings that it now expects of parents when it automatically assigns responsibility of children to them. That mothers will develop feelings of connection and commitment to their children during the course of pregnancy, notwithstanding agreements they may make to the contrary, demonstrates the strength of the parent-child relationship. It is in society's interest that these impulses be affirmed and encouraged.¹⁷ When mothers in this situation are prohibited from keeping their children because of a previous contractual commitment, we are construing these impulses as wrong, even pathological, rather than understandable and defensible.¹⁸ Enforcement of a surrogacy contract

14. N. C. GEN. STAT. § 48-1(1)(1984).

15. N. C. GEN. STAT. § 48-1(2)(1984).

16. N. Taub, *Concepts of Motherhood and Reproductive Choice: Feminist Tensions* (1988) (unpublished manuscript).

17. Bartlett, *Baby M: The Legal System Confronts Conflicting Human Values*, 5 DUKE LAW MAGAZINE 4, 5-8 (Summer 1987).

18. The trial court in *In re Baby M.*, for example, concluded that the mother, Mrs. Whitehead, was overbearing, manipulative, impulsive, exploitative, insensitive, and untruthful. 217 N.J. Super. 313, 392-97, 525 A. 2d 1128, 1167-70 (Ch. Div. 1987). The state Supreme Court, reached a more sympathetic conclusion: "[G]iven her predicament, Mrs. Whitehead was rather harshly judged. . . we think it is expecting something well beyond normal human capabilities to suggest that this mother should have parted with her newly born infant without a struggle. Other than survival, what stronger force is there? . . . her resistance to an order that she surrender her infant, possibly forever, merits a measure of understanding." 109 N.J. 396, 459, 537 A. 2d 1227, 1259.

against the surrogate mother assumes that parents should be able to set aside their parental sentiments at will (if the price is right). Such a view of parenthood is undesirable, and contrary to the policies reflected in the state's adoption statutes.¹⁹

The other arguments for exempting surrogacy arrangements from adoption statutes are also unconvincing. The attempt to distinguish the sale of a baby, prohibited by the baby-selling laws, from the sale of services by the pregnant woman, is a formalistic one which ignores the substance of the transaction involved in surrogacy. Baby-selling prohibitions are meant to prevent the commercialization of children, i.e., to prevent persons from giving children a monetary value.²⁰ A surrogate parent contract which transfers parental rights from a biological mother to the biological father and his wife defeats this objective. Surrogacy arrangements often include a statement of non-consent signed by the mother's husband to promote the fiction that the transaction is limited to adjusting the rights between biological parents, both of whom presumably already have rights to the child, and to avoid the characterization that money is paid for an adoption.²¹ But as noted above, surrogacy arrangements include an explicit expectation that the child's biological mother, for money, will voluntarily terminate her parental rights in favor of the biological father (whose rights would otherwise be shared with the biological mother) and his wife. The surrogacy arrangement is a commercial arrangement that contemplates an economic bargain—the exchange of money for rights to a child and, ultimately, adoption.²²

Even if applicable to surrogacy arrangements, section 48-11 would not criminalize all such voluntary arrangements—only those involving the payment of money. The application of this criminal prohibition recognizes the denigration of human life that occurs when a cash value is allowed to be placed on a child's life, but allows other voluntary, non-commercial arrangements to be made. Application of the ninety and thirty-day revocation of consent provisions,²³ however, will mean that even such lawful agreements will be subject to the mother's legal right to revoke her consent within the statutory period. While the legislature might well decide that ninety (or thirty) days is too long a period in which the mother can change her mind, surrogate contracts should be

19. Bartlett, *Re-Expressing Parenthood*, 98 YALE L. J. 291, 328-35 (1988).

20. See *In re Baby M.*, 109 N.J. 396, 423-25, 537 A. 2d 1227, 1241 (1988); Radin, *Market Inalienability*, 100 HARV. L. REV. 1849, 1930 (1987); Bartlett, *Re-Expressing Parenthood*, *supra* note 19, at 329-30.

21. Capron, *Alternative Birth Technologies: Legal Challenges*, 20 U.C.D. L. REV. 679, 703 (1987).

22. Bartlett, *Re-Expressing Parenthood*, *supra* note 19, at 330.

23. See *supra* text accompanying note 10.

subject to the same kind of revocation provisions available to women in other adoption contexts. The highest court of Kentucky has so held with respect to its 5-day revocation statute. While not invalidating surrogacy contracts *per se*, the Kentucky Supreme Court held that the statutory revocation provisions take precedence over any contractual commitments the mother had made, thereby "preserv[ing] to the mother her right of choice regardless of decisions made before the birth of the child."²⁴

It might be argued that the revocation rule of section 48-11(a), even if applicable, applies from date of relinquishment, i.e., the date the contract was signed, not the date of the child's birth. If so, the woman would not have the right to change her mind after the birth of the child because the ninety (or thirty) days would have expired. It is difficult to say whether this argument would be successful in North Carolina. North Carolina, unlike some states,²⁵ does not specifically prohibit the giving of parental consent for adoption before the child is born. Such a requirement, however, can fairly be implied from the statutory scheme. I note, for example, that in specifying who must consent to an adoption, the North Carolina adoption statutes do not make an exception for a parent who consented to the adoption before the birth of the child.²⁶ If pre-birth consents are deemed invalid, the period for revocation of consent cannot begin to run before the birth of the child. This is an area which the General Assembly would do well to clarify.

B. *Child Custody Law.*

North Carolina law, like that of other states, provides that the custody of a child should be determined in accordance with the best interest and

24. *Surrogate Parenting Associates, Inc. v. Armstrong*, 704 S.W. 2d 209, 213 (1986).

25. Many states provide that a parent's consent to adoption is prohibited, or invalid, if made before the child's birth. See, e.g., ALASKA STAT. § 25.23.060(a)(1987); ARK. CODE ANN. § 9-9-208(a)(1987); FLA. STAT. ANN. § 63.082(4)(1984); GA. CODE ANN. § 19-8-4 (Cum Supp. 1988); IND. CODE ANN. § 31-3-1-6(b) Burns 1987 & Supp. 1988; MO. ANN. STAT. § 453.030(6) (Vernon 1986); N.D. CENT. CODE § 14-15-07 (1981); WYO. STAT. § 1-22-109(c)(1988). Some states specify a particular time before which parental consent will not be effective. See, e.g., ARIZ. REV. STAT. ANN. § 8-107(b) (Supp. 1987) (72 hours); ILL. REV. STAT. ch. 40 § 1511 (1980) (72 hours); KY. REV. STAT. ANN. § 199.500(5) (Michie/Bobbs-Merrill 1982 & Supp. 1986) (fifth day); LA. REV. STAT. ANN. § 9:422.7(A) (West Supp. 1988) (fifth day); MASS GEN. LAWS ANN. ch. 210, § 2 (West 1988) (fourth day); MISS. CODE ANN. § 93-17-5 (1972) (three days); NEV. REV. STAT. ANN. § 127.070(1) (Supp. 1988) (72 hours); N.H. STAT. ANN. § 40-7-38(B) (1986) (72 hours); OHIO REV. CODE ANN. § 3107.08(A) (Anderson 1980) (72 hours); 23 PA CONS. STAT. ANN. § 2711(c) (Purdon Supp. 1988) (72 hours); VA CODE ANN. § 63.1-225(A) (1987) (10 days). At least two states seem to allow an adoption petition or a petition for termination of parental rights to be filed before the child's birth, but provide that a hearing may not be held until some time after birth. See TEX. FAM. CODE ANN. § 15.021(a) & (b) (Vernon Supp. 1988) (five days); WASH. REV. CODE §§ 2633.080(3), 2633.090(1) (Supp. 1988) (48 hours).

26. N.C. GEN. STAT. §§ 48-5, 48-6, 48-7, 48-9 (1984 & Supp. 1988).

welfare of the child.²⁷ Neither statutory nor decisional law in North Carolina permits agreements between parents to determine the custody of a child or to supersede any judgment a court might have on what is in the best interest and welfare of the child. To the contrary, North Carolina courts have held that agreements between parents are not binding as to the custody of children. In *Wolfe v. Wolfe*,²⁸ for example, the court of appeals held that parents could not reach an agreement as to custody of their children which overrode a court's previous custody order. The state supreme court has reached the same conclusion with respect to the terms of an agreement reached by parents on child support.²⁹

Judicial decisions in other states are entirely in line with North Carolina precedent. Agreements between parents over custody or support of children are simply not enforceable.³⁰ Custody law requires that decisions be made from the perspective of the child's interests. Any rules that pre-determine these decisions based upon arrangements made by parents—particularly arrangements explicitly involving the payment of money—compromise those interests. There is nothing in the nature of the surrogacy transaction that provides a reason for a different rule. Indeed, since money is explicitly paid in connection with most surrogacy arrangements, and since such agreements are made before the child is conceived and thus before his or her best interests can be taken into account, surrogacy presents a circumstance in which courts should be especially inclined *not* to be influenced by the terms of any agreement made between parents.

The question remains how custody law would likely be applied at the birth of a child born of a surrogacy arrangement. Some commentators have argued that the mother should not only be able to void the contract, but also that she should have the first option of retaining her custody of the child.³¹ This result comports with the preference in some states for the mother to have custody in custody disputes between unmarried parents.³² I have argued elsewhere that the mother who has formed an emo-

27. N.C. GEN. STAT. § 50-13.2 (1987).

28. 64 N.C. App. 249, 307 S.E.2d 400 (1983).

29. *Crutchley v. Crutchley*, 306 N.C. 518, 293 S.E.2d 793, 797-98 (1982); *Williams v. Williams*, 261 N.C. 48, 134 S.E.2d 227, 235 (1964). See also *Bottomley v. Bottomley*, 82 N.C. App. 231, 346 S.E.2d 317 (1986); *Perry v. Perry*, 33 N.C. App. 139, 234 S.E.2d 449, *cert. denied*, 292 N.C. 730, 235 S.E.2d 784 (1977); *McKaughn v. McKaughn*, 29 N.C. App. 702, 225 S.E.2d 616 (1976).

30. See, e.g., *In re Rhea*, 207 Kan. 610, 612, 485 P.2d 1382, 1384, (1971) (custody); *Wist v. Wist*, 101 N.J. 509, 503 A.2d 281 (1986) (custody); *Hicks v. Hicks*, 223 Neb. 189, 388 N.W.2d 510 (1986) (custody); *Swanson v. Swanson*, 372 N.W.2d 420 (Minn. App. 1985) (support); *Korshak v. Korshak*, 140 Vt. 547, 442 A.2d 464 (1982) (custody); *Blackshear v. Blackshear*, 52 Haw. 480, 478 P.2d 852 (1971) (support).

31. See, e.g., Capron, *supra* note 21, at 698; Radin, *supra* note 20, at 1934; Graham, *Surrogate Gestation and the Protection of Choice*, 22 SANTA CLARA L. REV. 291, 319 (1982).

32. See, e.g., OKLA. STAT. tit. § 6 (1981), interpreted in *In re Baby Boy D.*, 742 P.2d 1059, 1068

tional and psychological bond with her child through pregnancy and childbirth should have a custodial preference over the father whose connection to the newborn child is more attenuated.³³ North Carolina law would seem to preclude such a custodial preference, however, by specifically providing that the custody rights of the mother and father to an illegitimate child are equal.³⁴ Thus, in this state, a custody hearing would have to proceed without the benefit of a tiebreaking preference in favor of either parent.

C. Termination of Parental Rights Statutes

North Carolina law provides specific grounds upon which parental rights may be involuntarily terminated.³⁵ None of these grounds would ordinarily be met in a surrogacy arrangement. In addition, parental rights have been given constitutional protection which prohibit the termination of parental rights without due process of law.³⁶ These protections are also disregarded in surrogacy arrangements.

An argument might be made that when a mother signs a surrogate parent contract, she has waived the statutory and constitutional protection otherwise available to her.³⁷ The little authority that exists on this point in other states suggests that a state's termination statutes, in the absence of special legislation in other states to the contrary, will override a surrogate parent contract waiving the protection of these statutes.³⁸

(Okla. 1985) ("The mother of an illegitimate minor is entitled to its custody"); 14 VT. STAT. ANN. § 2644 (Supp. 1988) (mother of illegitimate child is child's guardian); *Allen v. Childress*, 448 So. 2d 1220 (Fla. Dist. Ct. App. 1984) (mother is natural guardian of child); *Kuhmer v. Gibson*, No. 81-924 (Ohio Ct. App. filed September 30, 1981) ("The mother of an illegitimate child is its natural guardian and has the legal right to custody, care and control of such child superior to the right of the natural father. . .") (citing *In re Gutman*, 22 Ohio App. 2d 125 (1969)). It is the tradition in favor of the mothers of illegitimate child to which the New Jersey Supreme Court in the *Baby M.* case was faithful when it declared that "only in an extreme, truly rare, case should the child be taken from its mother *pendente lite*. . ." 109 N.J. at 462, 537 A.2d at 1261.

33. Bartlett, *Re-Expressing Parenthood*, *supra* note 19, at 313. For one of the fullest arguments that custody law should *not* favor the mother, see Garrison, *Surrogate Parenting: What Should Legislatures Do?*, 22 FAM. L.Q. 149, 155-59 (1988).

34. N.C. GEN. STAT. § 49-15 (1984).

35. N.C. GEN. STAT. § 7A-289.32 (1986).

36. See *Santosky v. Kramer*, 455 U.S. 745 (1982) (parents constitutionally entitled to clear and convincing standard of proof in termination of parental rights hearing); *Stanley v. Illinois*, 405 U.S. 645 (1972) (unwed father may not be deprived of custody of children without due process of law).

37. M. FIELD, *SURROGATE MOTHERHOOD: THE LEGAL AND HUMAN ISSUES* 73 (1988).

38. See *Surrogate Parenting Associates, Inc., v. Armstrong*, 704 S.W.2d 209, 212-13 (Ky. 1986) (state termination of parental rights statutes take precedence over surrogate parent contract); *In re Baby M.*, 109 N.J. 396, 425-34, 537 A.2d 1227, 1242-46 (1988) (contractual provisions for termination of parental rights are not enforceable because they do not meet the statutory prerequisites carefully established by the New Jersey legislature). *But cf.* *Syrkowski v. Appleyard*, 420 Mich. 367, 362 N.W.2d 211 (1985) (state paternity statutes present an appropriate vehicle for establishing paternity of biological father in a surrogacy arrangement even prior to birth of child).

Termination statutes in this state are generally construed strictly, in recognition of the importance of the parent-child relationship.³⁹ Moreover, if the contract itself is not valid and enforceable, it cannot function as a valid waiver. While further clarification on this issue might be advisable, it seems unlikely that North Carolina courts would permit a surrogate parent agreement to override the protection specified in section 7A-289-32.

D. *Paternity and Artificial Insemination Statutes*

North Carolina, like most states, has legislation respecting the establishment of paternity, including specific rules governing the legitimacy of the children conceived as a result of artificial insemination. As applied in the surrogacy context, the relevant statutes present a potential conflict. On the one hand, Chapter 49 of the General Statutes permits a biological father to bring an action to establish paternity of a child "of parents not married to each other".⁴⁰ The father's right to establish his paternity under this chapter would seem to exist even if the mother of the child is married to someone else.⁴¹ Section 49A-1 of the General Statutes, however, provides that any child conceived as a result of the artificial insemination of a woman whose husband consents in writing to the insemination is the legitimate child of the married couple. Application of these sections simultaneously would seem to allow both the mother's husband and the biological father to establish status as legal father.

It might be argued that the Chapter 49A proviso regarding the husband's consent to artificial insemination is for the protection of the husband; he should not be responsible for a child who is not biologically his and in whose conception he did not participate. As such, the protection should not be forced upon him. Since the statute does not specifically require that consent by the husband be given before the insemination occurs, written consent given *after* the procedure—perhaps even after the

39. See, e.g., *In re Montgomery*, 311 N.C. 101, 316 S.E.2d 246 (1984) (petitioner must prove clearly, cogently and convincingly the existence of one or more of the statutory grounds for termination); see also *Interest of W.F.J.*, 648 S.W.2d 210 (Mo. App. 1983) (severance of the parent/child relationship is an exercise of awesome power and demands strict and literal compliance with the statutory authority from which power is derived); *Interest of Monarity*, 302 N.E.2d 491 (Ill. App. 1973) (parental rights cannot be severed unless clear and convincing evidence is presented in strict compliance with statutory authority).

40. N.C. GEN. STAT. §§ 49-1, 49-14, 49-16 (1984).

41. In a number of states, a putative father does not have standing to bring a paternity action, particularly where the mother of the child is married to another man. See, e.g., KY. REV. STAT. § 406.021(1) (Baldwin 1988) (action may be brought by mother, child, or person or agency substantially contributing to the support of the child); ME. REV. STAT. tit. 19 § 272 (Cum. Supp. 1988-1989) (action may be brought by mother, child, or public agency chargeable with support of the child); MISS. CODE ANN. § 93-9-9 (Cum. Supp. 1988) (same); N.H. REV. STAT. ANN. § 168-A:2 (1977) (same); UTAH CODE ANN. § 78-45a-2 (1987) (same).

birth of the child—should be valid.⁴²

There are a few different ways in which the conflict between Chapters 49 and 49A might be resolved. In one approach, a court might decide that the statutes in question permit a child to have two legal fathers, each with responsibilities and rights in the child. This result is not unlike the situation in which a noncustodial biological father and a stepfather (or a noncustodial biological mother and a stepmother) would both be liable for the child's support.⁴³ While I have argued in support of such a result where a child has developed social parent-child relationships with more than one parent,⁴⁴ however, multiple parents would not seem desirable in the case of a newborn child of a surrogacy arrangement, who has not yet experienced overlapping parental relationships.

Another approach is for the courts to find one set of statutes controlling over the other. The question under this approach is which rules should be given superior status. Rules relating to artificial insemination would appear to be more specific, favoring their application under the general rule of statutory construction that the specific preempts the general.⁴⁵ On the other hand, given the clear assumption of North Carolina law that the biological parent is the "real parent,"⁴⁶ a strong argument could be made that the artificial insemination statute should be narrowly limited to those situations in which a woman and her infertile husband set out to have a legitimate child through artificial insemination, and exclude those situations in which the initial plan was that the biological father and his wife be the child's parents.

This confusion should be resolved. In the event the legislature chooses to allow specific performance of surrogacy contracts, it will want to clarify chapter 49A, perhaps to require that if the mother's husband does not consent to the artificial insemination procedure before the child is conceived, he will have no parental rights or responsibilities.⁴⁷ If it chooses

42. Under this theory, the husband should be able to provide the necessary consent even in the face of a prior statement of "non-consent." See *In re Baby Girl*, No. 83-AD (Jefferson Cir. Ct., 6th Div., March 8, 1983) ("mere affidavit" does not rebut presumption of paternity of surrogate mother's husband). See also Bartlett, *Courts Not Bound by Parental Agreements*, 119 N.J.L.J. Feb. 20, 1987, at 27 n.2, col. 3 (arguing that court not bound by non-consent document).

43. N.C. GEN. STAT. § 50-13.4(b)(1987) provides that both parents are primarily liable for a child's support, and any parent standing *in loco parentis* is secondarily liable. In some jurisdictions, the stepparent has a co-equal obligation of support. See, e.g., WASH. REV. CODE ANN. § 26.16.205 (1986); N.H. REV. STAT. ANN. § 546-A:1, 2 (1974 & Supp. 1988); IOWA CODE ANN. § 597.14 (West 1981).

44. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family has Failed*, 70 VA. L. REV. 879, 944-62 (1984).

45. C. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 51.05 (p. 315) (rev. of 3d ed. of Sutherland Statutory Construction 1973); *State ex rel. Utilities Commission v. Lumbee River Elec. Membership Corp.*, 275 N.C. 250, 166 S.E.2d 663 (1969).

46. See *supra* text accompanying note 40.

47. Such a clarification would need to be carefully drafted to avoid reaching the wrong results

the unenforceability and/or criminalization approach, it must decide whether the mother's husband, or the biological father, should be the parent entitled to compete for custody (or required to assume financial responsibility for the child).

E. *Contract Law*

The enforceability of surrogate parent contracts might also be evaluated under existing contract law principles. In contract law terms, the critical issue is whether either party to a surrogate parent contract may specifically enforce the contract against the party who reneges on his or her contract obligations.

There are a number of arguments against the availability of specific enforcement as a remedy in surrogate parent contract disputes. For example, under conventional contract law principles, specific performance is not available as a remedy for personal services not yet performed.⁴⁸ Thus, if a mother reneges on her part in the agreement and wants to keep the child, she might resist on the grounds that she cannot be compelled to perform the personal services she has promised. This argument is made possible by the position many fathers take in order to avoid application of criminal anti-baby-selling statutes—that the contract is for the performance of services rather than the sale of goods.⁴⁹ The difficulty with this argument is that to the extent the mother completes, or intends to complete, her pregnancy and childbirth, she is not being compelled to complete contract services. At the point when the child is born, mere delivery (along with cooperation in a legal shift in rights) is all that is required. Such aspects of performance are not the type of services which the rule against specific performance of a personal services contract is intended to preclude.⁵⁰

Further support might be sought from the contract law principle that an agreement in the context of an intimate family relationship, such as a promise to marry, cannot be specifically enforced.⁵¹ The premise of this rule, however, would also seem inapplicable. The law does not wish to

in other cases, such as when the sperm donor is unknown or does not intend to have the responsibilities of fatherhood, and the mother's husband consents to the artificial insemination after the procedure has taken place.

48. See O'Brien, *Commercial Conceptions: A Breeding Ground of Surrogacy*, 65 N.C.L. REV. 127, 150-51 (1986) (discussing rule in surrogacy context); A. FARNSWORTH, *CONTRACTS* §§ 12.7, 835-36 (1982) (rule in general context); RESTATEMENT (SECOND) OF CONTRACTS §§ 367(1)(1981) ("promise to render personal services will not be specifically enforced").

49. See *supra* text accompanying note 13.

50. See Wolf, *Enforcing Surrogate Motherhood Agreements: The Trouble With Specific Performance*, *supra* note 2, at 391-93.

51. See Farnsworth, *Legal Remedies for Breach of Contract*, 70 COLUM. L. REV. 1145, 1150-52 (1970); O'Brien, *supra* note 48, at 150.

force persons to live together on intimate terms. However, specific enforcement of a surrogate parent contract against an unwilling mother would not do this. It would, to be sure, limit the development of an intimate, family relationship which one parent seeks, but it would not force such a relationship upon an unwilling party.⁵² The argument may have greater force when made by a father who seeks to reject a child whom he had made a contractual commitment to receive into his home as his own. Application of the principle in this context, however, would fight against the strong precedent in the law in favor of parents—even unwilling parents—taking responsibility for their children.⁵³ Because of its child protection function, the state rarely forces a parent to take a child the parent declares is unwanted; but until permanent responsibility for the child is assumed by another, a parent may be made at least financially responsible for a child regardless of whether he or she wants custody.⁵⁴

The contract law principle most likely to preclude specific enforcement of a surrogate parent contract is the principle that contracts that are illegal or against public policy will not be enforced. As noted above, every state has criminalized the exchange of money for children.⁵⁵ Even if it were to be determined that such criminal laws are not *directly* applicable to specific persons involved in surrogacy arrangements, surrogate parent contracts are still likely to be deemed contrary to public policy. Note that this conclusion turns on the same analysis as that applied to the relevance of state adoption and custody law: Do surrogacy arrangements implicate the same kinds of risks and dangers as other applications or commercialized adoption? If they do, the same reasons that make our adoption and custody laws applicable to surrogacy arrangements render those arrangements unenforceable under contract law as well.

III. CONSTITUTIONAL CONSIDERATIONS

A number of constitutional arguments are made in support of the claim that surrogate parent contracts should be judicially enforceable. For example, it is argued that the biological father and his infertile wife have a due process right to procreate that is violated when the state refuses to recognize surrogate parent contracts.⁵⁶ Surrogacy arrangements

52. Wolf, *supra* note 2, at 391-92.

53. See, e.g., N.C. GEN. STAT. § 49-2 (1984) (non-support of illegitimate child a misdemeanor).

54. *Id.*; N.C. GEN. STAT. § 49-7 (Supp. 1988) (court may order parent to support illegitimate child); N.C. GEN. STAT. § 50-13.4 (1987) (father and mother primarily liable for support of minor child).

55. See *supra* text accompanying, note 2.

56. See, e.g., Andrews, *The Legal Status of the Embryo*, 32 LOY. L. REV. 357, 359-61 (1986); Graham, *supra* note 31; Keane, *Legal Problems of Surrogate Motherhood*, *supra* note 13, at 165;

may be the only practical alternative for some couples seeking to have children. When the state disallows such arrangements, or fails to make its courts available for enforcement of them, the argument goes, these couples have been unconstitutionally denied the ability to have children.⁵⁷ As the trial court in *Baby M* case put it, "it must be reasoned that if one has a right to procreate coitally, then one has the right to reproduce non-coitally."⁵⁸

Couples seeking to enforce surrogate parent contracts have also made arguments under the equal protection clause. One argument is that if such contracts are not enforced, couples consisting of a wife and an infertile husband are able to procreate through legal artificial insemination procedures, while couples consisting of a husband and an infertile wife are not.⁵⁹ Turned around, the equal protection argument can be made that if a man is allowed to sell his procreative services (his sperm), so also should a woman be able to sell hers (her egg and the use of her womb).⁶⁰ Put still another way, if the biological father is bound to accept responsibility for a child produced through a surrogacy arrangement, so also should the surrogate mother be bound by the agreement.⁶¹

The constitutional arguments offered in favor of enforcing surrogate parent contracts are shallow and conclusory. The due process argument ignores the conflict between the infertile couple's "right" to procreate and the biological mother's procreative rights. Although the United States Supreme Court has recognized the constitutional right to procreate, no decisions of the Court establish that this right can be asserted by a biological father against a mother who has borne the child; the mother's right to procreate in this instance must be at least as compelling as the

Robertson, *Embryos, Families and Procreative Liberty: The Legal Structure of the New Reproduction*, 59 S. CAL. L. REV. 939, 958-64, 1040 (1986); Note, *Developing a Concept*, *supra* note 6, at 1295-98; Comment, *Prohibiting Payments to Surrogate Mothers: Love's Labor Lost and the Constitutional Right of Privacy*, 20 J. MARSHALL L. REV. 715, 729-30 (1987); Comment, *Surrogate Mother Agreements*, *supra* note 12, at 479-82; Note, *The Rights of the Biological Father: From Adoption and Custody to Surrogate Motherhood*, 12 VT. L. REV. 87, 108-11 (1987).

57. Keane, *supra* note 13, at 165; Robertson, *supra* note 56, at 103.

58. *In re Baby M.*, 217 N.J. Super. 313, 386 525 A.2d 1128, 1164 (Ch. Div. 1987, *aff'd in part* *rev'd in part*, 109 N.J. 396, 537 A.2d 1227 (1988).

59. See Robertson, *supra* note 56; Field, *Surrogate Motherhood—The Legal Issues*, IV N.Y. SCH. HUM. RTS. ANN. 481, 497 (1987).

60. See Coleman, *supra* note 6, at 81-2; Keane, *supra* note 13 at 153; Lorio, *Alternative Means of Reproduction: Virgin Territory for Legislation*, 44 LA. L. REV. 1641, 1653 (1984); Note, *Developing a Concept*, *supra* note 6, at 1293-94; Comment, *Baby-Sitting Consideration: Surrogate Mother's Right to "Rent Her Womb" for a Fee*, 18 GONZ. L. REV. 539 (1982-1983); Comment, *Parenthood by Proxy: Legal Implications of Surrogate Birth*, 67 IOWA L. REV. 385, 386 (1986); Comment, *Surrogate Motherhood: The Need for Social Acceptance*, 13 OHIO N.U. L. REV. 517, 524 & n. 62 (1986); *In re Baby M.*, 217 N.J. Super. at 388, 525 A.2d at 1165.

61. See *In re Baby M.*, 217 N.J. Super. at 384, 525 A.2d at 1163.

father's.⁶² We can ignore those rights only if the contract is properly enforceable. The question remains: what status should the contract be given? If public policy is against its enforcement, the constitutional arguments would seem to compel no different result.

The equal protection argument that the contract should be enforced because the mother's right to sell her procreative services should be as strong as the father's right to sell his sperm is founded upon a mistaken premise. It seems doubtful that a man who contracts to sell his sperm could be obligated to perform such a contract, even after he had produced his sperm.⁶³ The man's ability to sell his sperm does not amount to the right of another individual or the state to compel him to follow through with his intentions once he changes his mind. Likewise, when a surrogate mother changes her mind about following through with a surrogacy agreement, what is at stake is not her right to sell her reproductive services, but rather her right to back out of the arrangement. Once again, constitutional analysis returns us to the fundamental question of whether public policy should allow the mother to renege on her intention to give up her child.

Finally, the argument that because the father may be required to support the child the mother should also be bound by the contract, ignores the realities of the circumstances under which such controversies arise. When a child is born, the state obligates both biological parents for his or her care. Unless the parents live together, one parent will necessarily be obligated to support a child even though that parent does not have primary custody. Thus, the fact that a parent may be obligated to support a child he or she has produced, on purpose or by accident, does not entitle that parent to the child's primary custody, at least not in the face of a conflicting claim by the other parent. In short, the state may choose to have a special rule in the surrogacy context but the federal Constitution does not require it to do so.

IV. CONCLUSION

The policies underlying existing adoption and custody laws in this state seem inconsistent with an enforceability approach to surrogate parent contracts. Whether or not a surrogacy arrangement calls for the exchange of money, the commitment to give up one's child before the child's birth is a matter too fraught with the kinds of difficulties sought to

62. Stark, *Constitutional Analysis of the Baby M. Decision*, 11 HARV. WOMEN'S L.J. 19, 23-33 (1988); Bartlett, RE-EXPRESSING PARENTHOOD, *supra* note 19, at 309, 329. See *Doe v. Kelley*, 106 Mich. App. 438, 441 (1981), *cert. denied* 459 U.S. 1183 (1983) (state anti-baby-selling statute does not violate infertile couple's constitutional right to bear or beget a child); *In re Baby M.*, 109 N.J. 396, 447-52, 537 A.2d 1227, 1253-55 (1988).

63. Bartlett, RE-EXPRESSING PARENTHOOD *supra* note 19 at 334, n. 188.

be avoided in North Carolina's adoption statutes to provide the basis for the legal termination of rights to a child a mother has carried and delivered. It seems doubtful that these difficulties could be controlled through a detailed scheme regulating such matters as fees, the screening and counselling of participants, the obligations of the mother during pregnancy, and so on. Moreover, such regulations could be easily evaded and might also open courts up to litigation over the details of a woman's pregnancy.⁶⁴

A surrogate parent contract should not be enforceable in North Carolina insofar as it ignores restrictions placed on adoptions in this state, including the statutory requirements for revocation of consent and the prohibition against payment of money in connection with an adoption. Certain amendments to the North Carolina adoption statutes might improve existing adoption law not only in surrogate parent cases but in other adoption situations as well. For example, the period of time within which a parent placing a child for adoption may revoke his or her consent in North Carolina is comparatively long (90 days for private placements, 30 days for placements through a social services agency). The trend in other states is in favor of shorter periods within which revocation may occur. Ten days is a reasonable period.⁶⁵ The legislature may also want to clarify the apparent conflict between sections 49-16 and 49A-1 of the General Statutes,⁶⁶ resolving whether the surrogate mother's husband and/or the biological father should be the child's legal father if the arrangement falls apart and the mother retains custody of the child. The basic structure of North Carolina's adoption laws, however, should remain intact.

Application of section 48-11, North Carolina's anti-baby-selling statute, to surrogacy arrangements would implement the criminalization approach in this state and constitute a more aggressive anti-surrogacy stance. It should be noted that such application would not criminalize *all* surrogacy arrangements—only those involving the payment of money.⁶⁷ It is often argued, quite plausibly, that the criminalization approach would merely drive the practice of surrogacy underground where it would not be subject to control or supervision.⁶⁸ Whether this danger

64. See Garrison, *supra* note 33, at 152-53.

65. See, e.g., MINN. STAT. ANN. § 259.24 (6a) (West Supp. 1988); W. VA. CODE § 48-4-5 (b) (1986).

66. See *supra* text accompanying note § 40-47.

67. Even if the arrangement is criminal in some respects, or unenforceable, an adoption may not necessarily be disallowed. See *In re Adoption of Child by N.P. & F.P.*, 165 N.J. Super. 591, 398 A. 2d 937 (1979) (adoption upheld notwithstanding illegal use of unapproved intermediaries and payment of money); *Miroff v. Surrogate Mother*, 13 FAM. L. REP. (BNA) 1260 (1987) (adoption approved notwithstanding voidability of surrogacy agreement).

68. Garrison, *supra* note 33, at 154. See also Landes & Posner, *The Economics of the Baby*

exceeds the more general dangers that flow from state toleration (or endorsement) of commercialized surrogacy is a difficult question on which the courts need legislative guidance. If the legislature wishes to reject the criminalization approach, a clarifying amendment to section 48-11 would seem advisable.

If the legislature follows either a nonenforceability approach or a criminalization approach, custody conflicts may nonetheless arise between parents over custody of a child born of a surrogacy arrangement. The parents may each seek custody, or they may each seek to compel the other parent to take custody. In either case, who prevails should be determined under custody and support law, not contract law. Thus, either or both parents may be held responsible for the child neither wants; and either (or in rare cases neither) parent may obtain custody of a child that both want. Likewise, even if the contract is not enforceable, a court may still make some orders adjusting the financial rights and obligations of the parties. Where a surrogate mother who decides to keep her child has received money under the contract, for example, a court may order her to return the money if the father is not going to obtain custody of the child. And under custody law, either parent may be ordered to support the child even if the other parent is awarded custody.

The principles expressed in existing North Carolina adoption and custody law are founded on basic policy tenets which have considerable relevance to surrogate parent arrangements. While these arrangements may be different in some respects from the contexts in which adoption and custody law are more typically applied, the differences are less impressive than the similarities. Divergence from the basic principles upon which our notions of legal and social parenthood are based should be undertaken very cautiously.

Shortage, 7 J. LEGAL STUD. 323 (1978) (current anti-baby-selling laws create black market in adoptive infants).